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Supreme Court of the United States

October Term, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE
STATE OF NEW YORK

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

Statement of the Case

This case involves an appeal from a judgment (J.S. App. 29a-30a)[1] of the Court of Appeals of the State of New York

[1] References to "J.S. App. ...." are to Consolidated Edison's appendix to its Jurisdictional Statement; to "App. ...." are to Consolidated Edison's appendix to its brief on the merits; to "R. ...." are to the Record on Appeal below; and to "Commission's App. ...." to the Public Service Commission's appendix to its Motion To Dismiss Appeal Or Affirm Judgment Below.

which upheld an order by appellee Public Service Commission of the State of New York (Commission) restricting the use of utility bill inserts (leaflets enclosed with utility bills). The order prohibits utilities, including appellant Consolidated Edison Company of New York, Inc. (Consolidated Edison), from using bill inserts to disseminate messages espousing the position of utility managements on controversial matters of public policy.

The Commission's bill insert order was the culmination of its investigation of a complaint filed against Consolidated Edison by the Natural Resources Defense Council, *et al.* (NRDC) (App. 23-48). The NRDC objected to a Consolidated Edison bill insert discussing the need for nuclear power development. The complaint asked the Commission to ban the use of bill inserts for purposes of political advertising and, in addition, provide remedial relief to the complainants that would allow them to enclose a supplement in a future monthly billing presenting their views on nuclear power. The Commission concluded that the billing mechanism was an improper forum for use by utility management to express its views on controversial issues. It stated (J.S. App. 43a):

> Further, we shall not permit advertising on matters of public controversy to be included in the printed material that often accompanies the mailing of consumer bills. We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism. A utility company's mailing list provides an available conduit for the easy dissemination of information, which should be used for the benefit of both the consumer and the company to convey noncontroversial and useful information that will create a better informed public. It should not become a vehicle for dissemination only of the company's views on controversial matters of public policy. Accordingly, we will not permit bill inserts to be used by utility companies for the purpose of advertising their opinions or viewpoints on controversial issues of public policy.

When denying rehearing, the Commission discussed its rationale in greater detail (J.S. App. 64a-68a). It noted that the billing mechanism provided a unique means by which management may get its views in the hands of the ratepayers and that this conferred an undue advantage on management. Further, it noted the spacial limitations of the bill insert. The limitations, the Commission concluded, argued for restricting the use of bills inserts (J.S. App. 66a) ". . . to convey information that is clearly helpful to consumers, such as practical steps that individuals can take to conserve energy . . ." Finally, the Commission addressed the Constitutional free speech aspect of its ruling, stating (J.S. App. 67a):

> . . .[I]t does not contravene the utilities' rights of free speech or press. Utility bill inserts are not newspapers which, in principle, any person is free to publish and thereby make his opinions known to the public. The privilege to disseminate utility bill inserts derives from the privilege of franchised monopoly, conferred by the government. It can, therefore, be regulated by the government to assure that it is exercised in the public interest.
>
> We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to

purchase space in newspapers, and to speak before public gatherings. For these kinds of communications, we merely require that the companies, rather than their customers, bear the costs.

The goal of free speech and of a free press is a well-informed electorate capable of making sound public policy decisions. Our ruling does not diminish to any substantial degree the utilities' ability to contribute to that goal. It does, however, preclude their monopolizing the unique utility bill insert medium.[1]

[1] We note also that where the ratepayer's bill is accompanied by political advertisement, the political material is, absent allocation, getting a free ride; the utility is deriving the economic benefit of postage, envelope, labor and overhead involved in the billing process. And even if an allocation of the expenses could be made, the actual cost of enclosing such material in the bill itself does not approach the one-sided benefit to the management of being able to use the unique billing process in presenting its side of the controversy. It is certainly questionable whether ratepayers should be compelled to support views with which they do not agree. See *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

As a final matter, the Commission considered (J.S. App. 68a) the question of whether its standard of "controversial matters of public policy" was too vague. It decided that it was not, but did agree to provide prompt advisory rulings, if requested, on whether specific subjects came within its ban.

Consolidated Edison thereafter commenced a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules to review the Commission's determination. The litigation concluded in a judgment by the New York Court of Appeals upholding the Commission (J.S. App. 29a-30a). In its decision (J.S. App. 1a-15a), the Court of Appeals found first that the Commission had adequate statutory authority for its order and then held that the order was not barred by the First Amendment.

Prior to Consolidated Edison's state court proceeding, Long Island Lighting Company had commenced a suit to challenge the Commission's order in the Eastern District of New York. That case, *Long Island Lighting Company v. Public Service Commission* (77 Civ. 972), has been decided in an unreported decision by District Judge George C. Pratt (Commission's App. 20-42). By judgment dated March 30, 1979, Judge Pratt granted the Commission a declaratory judgment that its bill insert order ". . . does not infringe plaintiff LONG ISLAND LIGHTING COMPANY's rights under the first and fourteenth amendments to the United States Constitution." The case is now on appeal to the United States Court of Appeals for the Second Circuit.[2]

[2] In addition to Consolidated Edison's brief, we are also in receipt of briefs from numerous *amici* urging that this Court reverse the determination of the New York Court of Appeals. We have carefully examined the briefs of the *amici*, and except where noted specifically hereafter, believe that we have dealt with the points made in those briefs in the context of our response to Consolidated Edison's submission. Several references will be made to the brief of Long Island Lighting Company (LILCO) because of its detailed comments on various aspects of this case.

Summary of Argument

The New York Court of Appeals properly concluded that the Commission's ban on the use of utility bill inserts to express management's views on controversial matters was not prohibited by the First Amendment. The Court found that the Commission's prohibition was merely an evenhanded attempt to assure that the subject matter of political debates does not intrude upon the billing process. There has been no attempt to foster or stifle a particular point of view. The court correctly found that the ban is akin to a "time, place and manner" restriction on speech frequently allowed by this Court.

While restricting bill inserts, the Commission's ban leaves open ample alternative channels for communication of management's views. Consolidated Edison has every available means (the press, radio, television, news conferences, etc.) except bill inserts. It can even make direct mailings to its consumers.

The Commission's ban fulfills important state interests including (i) assuring that the limited space in bill inserts is used for utility service related purposes (*e.g.*, messages relating to complaint procedures, energy conservation, and safety hints); (ii) preventing ratepayers from becoming a captive audience for utility management's views; (iii) assuring that the ratepayers are not required to subsidize or provide a free ride for the dissemination of views with which they may disagree; and (iv) prevention of the emergence of a public forum where all points of view on controversial issues must be expressed while at the same time lessening the usefulness of the bill insert as a means of providing utility service-related information. As our discussion will show, because of the unique character of utility company bill inserts these various state interests, while discussed separately, are closely interrelated and should be considered on an aggregate basis.

The Commission's standard "controversial matters of public policy" is not unconstitutionally vague. It provides adequate notice to utilities as to what subjects are to be excluded from bill inserts.

ARGUMENT

Introduction

Throughout the course of this litigation, Consolidated Edison has consistently failed to grapple with the factual circumstances of this case, circumstances which fully justify the Commission's restriction on the use of utility bill inserts. The Commission and the court below have properly recognized that a public utility subject to pervasive state regulation may have its billing process controlled so that it operates in the public interest. In this case neither the need for nor the propriety of the regulation is diminished merely because it has an incidental impact on Consolidated Edison's ability to communicate. The Commission's order does not prevent debate on public issues from being "uninhibited, robust, and wideopen" (*New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)); rather it assures that the utility billing process is used only for matters directly relating to the rendition of utility service, a state interest entitled to full recognition by this Court.

Consolidated Edison has been joined by numerous *amici* in urging this Court to invalidate the Commission's bill insert regulation. A common theme running through Consolidated Edison's brief, as well as those of the *amici*, is that the Commission's regulation somehow significantly restricts the freedom of utilities to engage in public debate about controversial issues. This is simply not the case, since the order restricts but one form of communication leaving open all other forms of

communication a utility may desire to use. There is no support whatsoever for the proposition that utilities are unable to engage in public debate about any issue if the debate is not carried on in the midst of the utility billing mechanism.

I. The Courts Below Correctly Determined That Bill Inserts May Be Regulated Without Abridging Consolidated Edison's Freedom Of Speech.

A. The Commission's Regulation Is A Subject-Matter Restriction Frequently Permitted By This Court.

Consolidated Edison argues (Br. pp. 12-17) that the Commission's bill insert regulation is content related, therefore requiring (Br. pp. 17-21) that it withstand exacting scrutiny and be supported by a compelling state interest. While the Commission's regulation is not content related as that term has frequently been applied by this Court, the Commission's ban is nevertheless supported by several compelling state interests. These interests, as we discuss, *infra,* provide a complete justification for the ban, particularly in light of the regulation's minor restriction on Consolidated Edison's ability to communicate with its customers.

Consolidated Edison argues at length that the New York Court of Appeals erred when it concluded that the Commission's regulation is not a content-based restriction. Its argument misconstrues the finding of the court because it fails to consider the reasoning for its conclusion. The court properly considered the Commission's order to be closely akin to a traditional time, place and manner restriction frequently permitted by this Court. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 771 (1976), where the Court noted that: ". . . [w]e have often approved restrictions of that kind [time, place and manner] provided that they are justified without reference to the content of the regulated speech, that they

serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. . . ." [Citations omitted].[3]

The New York Court of Appeals concluded that the Commission's ban met the tests required for a time, place and manner restriction. It found (J.S. 9a-11a) that (1) ". . .[t]here is no doubt but that the regulation leaves open numerous alternative means of communication. . .."; (2) ". . . the ban unquestionably fosters an important governmental interest . . ." and (3) ". . .the regulation, properly viewed, is not content orientated. . . ."

The Court realized that the ban was defined by reference to the subject matter of bill inserts, *i.e.,* controversial matters of public policy; however, it found (J.S. App. 11a):

> . . . [I]t does not discriminate against persons of any particular political stripe or prohibit the expression of any one position on a hotly debated issue. In short, the restriction endeavors, in an objective and even handed

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[3] This Court has approved a similar test in *United States v. O'Brien,* 391 U.S. 367, 377 (1968), where it upheld O'Brien's conviction for burning his draft card:

> . . . [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest . . ..

Here, as in *O'Brien,* the Commission's prohibition relates to both speech and non-speech elements. The Commission is only secondarily concerned with the subject matter of Consolidated Edison's communications; the focus of the Commission's concern is primarily preserving the bill insert for its basic function of providing important, non-controversial information to consumers. Consolidated Edison is simply wrong when it asserts (Br. pp. 14-15) that the harm sought to be avoided by the ban is the communicative content of the bill insert.

manner, to limit billing insert materials to the innocuous and noncontroversial. Given these circumstances, where the communication intrudes upon the privacy of the home, such a limitation does not offend the First Amendment (*Erznoznik v. City of Jacksonville,* 422 US 205, 209; see *Greer v. Spock,* 424 US 828, 838-839; *Lehman v. City of Shaker Heights,* 418 US 298, 302-304; see, Tribe, American Constitutional Law, § 12-21, at pp. 690-691, & n 21).[4]

In a similar vein, Judge Pratt also concluded (Commission's App. 31-40) that the Commission's ban was akin to a time, place and manner restriction, finding that it leaves open ample alternative channels of communication and fulfills important governmental interests. Judge Pratt gave considerable attention to the "contents" aspect of the Commission's order. In a lengthy analysis of this Court's decision in *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), Judge Pratt noted that the Court had upheld a content-based restriction when allowing the City of Shaker Heights to refuse political advertising in vehicles of the city transit system. He concluded that there were even more reasons in the present case for a ban than there were for the one upheld by this Court in *Lehman.*

This Court was narrowly divided in *Lehman* with four Justices in favor of declaring the restriction unconstitutional. However, the issue that split the Court in *Lehman*—the

[4] Consolidated Edison argues that under the approach of the New York Court of Appeals (Br. p. 15) ". . . the State may suppress debate on all public issues, so long as the prohibition is applied in an 'evenhanded manner'. . . ." Of course, that argument has no relationship to this case where the utility's management may exercise its right to speak out on controversial issues in fora other than bill inserts. Consolidated Edison's argument is totally belied by the very nature of the Commission's bill insert ban. There simply has been no attempt on the part of the Commission to suppress free speech by utilities.

question of whether the city had created a public forum requiring that it be opened to all—is not present here. In fact, as Judge Pratt found in *Long Island Lighting* (Commission's App. 39), one reason for the Commission's restriction is to prevent bill inserts from becoming a public forum open to all so that the billing process is diverted from matters directly related to the rendition of utility service.[5]

We believe that the ban is, in the traditional sense of the terms, neither content neutral nor content based. Rather, the regulation is a subject-matter restriction unrelated to any attempt by the Commission to foster or deter a particular point of view.[6]

The neutrality of the Commission's ban distinguishes it from cases where the government has attempted to foster or suppress a specific point of view or particular information. *See, e.g., Miller v. California,* 413 U.S. 15 (1973) (banning obscenity); *Dennis v. United States,* 341 U.S. 494 (1951) (forbidding advocacy of violent overthrow of the government); *Landmark Communications v. Virginia,* 435 U.S. 829 (1978) (disclosure or publication of specified information).

Subject-matter restrictions have been upheld by this Court where necessary to achieve important state interests. A foremost example is *Lehman v. City of Shaker Heights, supra.* Other examples include *Greer v. Spock,* 424 U.S. 828 (1976) (involving a ban on political campaigning on a military base); *Young v. American Mini Theaters, Inc.,* 427 U.S. 50 (1976) (upholding Detroit's zoning ordinance limiting density of

[5] The public forum issue is discussed further in connection with the state interests underlying the Commission's regulation, *infra.*

[6] For an extended discussion of cases involving subject-matter restrictions, *see* Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions,* 46 Chic. L. Rev. 81 (1978).

theaters showing sexually explicit but not obscene films); and *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970) (upholding a statute permitting mail recipients to refuse lewd or offensive materials through the mail). The Commission's ban should similarly be upheld, especially since it poses only a minimal burden on Consolidated Edison's speech and fulfills important governmental interests.[7]

Consolidated Edison attempts to distinguish (Br. pp. 15-16) two of this Court's decisions (*Greer, supra* and *Lehman, supra*) by noting that the speakers in those cases were attempting to obtain access to the government's property to exercise free speech rights while, in this case, the Commission's order prevents the use by Consolidated Edison of its own property for First Amendment purposes. This Court drew no public property—private property distinction in its decisions in *Greer* and *Lehman*.[8] Nevertheless, as we discuss below, the issue in this case is not the prevention of the use of Consolidated Edison's property but, rather, the use to be made of the utility billing process which the ratepayers are required to support. It is unclear why Consolidated Edison's attempted distinction has anything to do with freedom of expression under the First Amendment. The result in each case is the same as with the Commission's ban—a purported speaker is denied access to a particular means of communication.

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[7] *Amicus* Mobil Corporation argues at length (Br. pp. 10-21), a point not raised below, that communication by mail is especially deserving of protection. We agree that communication by mail is frequently entitled to First Amendment protection. The Commission has, however, in no way attempted to censor the mail or interfere with federal regulation of the postal service. Consolidated Edison may still communicate by mail so long as it does not use bill inserts.

[8] This Court has rejected the contention that broadcasters have a First Amendment right to use their licensed facilities to broadcast without regard to reasonable Federal Communications Commission regulation (*Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 386-401 (1969)).

Consolidated Edison also argues (Br. p. 16) that in *Greer* and *Lehman* the restrictions were applied in an evenhanded manner, while here only the utility is precluded from using bill inserts to espouse its position. This argument completely misses the point. The prohibition is addressed to the use of bill inserts by utility management since those are the only parties who would otherwise be able to use the billing process to disseminate their positions. It is wrong for Consolidated Edison to argue that the Commission's ban is unevenhandedly applied since the company has refused to allow other parties to use the billing process to disseminate their views. In fact, the company's refusal to allow the Natural Resources Defense Council and other antinuclear proponents to use the billing mechanism prompted the complaint which led to the Commission's investigation and the resultant order to ban bill inserts. Before the Commission, the company argued vigorously that other parties should not be allowed to use bill inserts (R. 251-254). As we discuss below, the problems of making bill inserts a public forum was one reason for not giving Consolidated Edison's management access to the forum in the discriminatory manner it seeks.[9]

Consolidated Edison also relies (Br. pp. 13-14) on *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), for the proposition that the government may not make a content-based restriction on freedom of expression. That case, however, has no bearing upon the instant litigation. In *Mosley*, this Court decided that Chicago's ordinance banning

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[9] The assertion of LILCO in its *amicus* brief (p. 31) that the public forum issue is not before this Court is simply wrong. The Commission clearly predicated its ban in part on the adverse effects that would result from giving opposing points of view access to the billing mechanism (J.S. App. 66a-67a).

all picketing within a certain distance from schools except for labor picketing was impermissible because it singled out one area of expression for favorable treatment without any showing that the reasons for banning other picketing—alleged disruption of school activity—did not apply equally to the labor dispute picketing. This Court has, however, upheld restrictions on picketing that were not discriminatory. *See,* for example, *Grayned v. City of Rockford,* 408 U.S. 104 (1972), decided contemporaneously with *Mosley.* Here, the Commission has not discriminated against any one viewpoint or speaker, but has applied an evenhanded restriction on the use of the billing mechanism, preserving its use for materials closely related to utility functions. The unsupported differentiation present in *Mosley* is not present here.

Consolidated Edison has thus simply not shown that the Court of Appeals, insofar as it concluded that the Commission's ban was a permissible subject-matter restriction, was incorrect. To the contrary, the prior decisions of this Court demonstrate the correctness of the Court of Appeals' conclusion.

B. The Order Imposes Only A Minimal Burden On Consolidated Edison.

The Commission's ban relates to only one form of communication—bill inserts (messages enclosed with service bills). Consolidated Edison and all other utilities are not prohibited from using alternative means of communication. The Commission stressed (J.S. App. 67a):

> We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to purchase space in newspapers, and to speak before public gatherings. . . .

There can be no question that the New York Court of Appeals and Judge Pratt were correct in concluding that the ban leaves open "ample alternative channels for communication". *Virginia State Board of Pharmacy, supra* at 771.

The Court of Appeals' decision, concluding that there are ample alternative channels for communication, is in no way in conflict with this Court's determination in *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977), where this Court restated its prior holding (431 U.S. at 93) that ". . . laws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether. . . ." (Citations omitted.) That case involved the placement of "for sale" signs in front of residential property. The Court determined that the banning of the "for sale" signs was not needed, in the factual situation existing in *Willingboro,* to fulfill the governmental interest sought to be advanced by the ordinance, *i.e.,* stabilization of racially integrated housing. This factual context appears to have been critical since the Court (431 U.S. at 95 n 9) did not criticize the decision in *Barrick Realty, Inc. v. City of Gary,* 491 F.2d 161 (7th Cir. 1974), where panic selling had occurred. The Court also stressed (431 U.S. at 93-94) that an additional problem with the argument that there were ample alternative channels of communication was that the town was not, in fact, concerned with forms of communication, but rather, with the message on the sign. In the instant case, the Commission's concern is with the use of the form of communication and not the message which may be conveyed in any other manner than bill inserts.

In this case, not only is the regulation not viewpoint oriented, but there are sound public interest reasons for the restriction on the one hand and there is no realistic evidence, on the other hand, that Consolidated Edison has been

deprived of the cheapest[10] or most effective[11] means of communication. Consolidated Edison's argument (Br. pp. 24-25) that it has been foreclosed from the most economic means of disseminating its information rests upon the totally unjustified assumption that only the out-of-pocket or incremental costs of producing bill inserts will be assigned to the utility's shareholders.[12] It assumes that utility ratepayers should be required to contribute the costs of postage, en-

[10] In any event, Consolidated Edison is not constitutionally entitled to use any means it desires to communicate. This Court has upheld restrictions on expression, even in public places usually deserving of protection, despite claims that the restrictions were in the most appropriate location for communication, (*Adderley v. Florida*, 385 U.S. 39, 48 (1966), citing *Cox v. Louisiana*, 379 U.S. 536 (1965)), or the easiest and cheapest means of communication (*Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949)).

[11] LILCO states (Br. p. 8) that the Commission has found bill inserts so effective it has ordered their use rather than newspaper advertisements to inform customers of rate increases. This is not true. The Public Service Law requires newspaper advertising of proposed rate changes. The requirement for notice of rate increases in bill inserts is simply supplemental.

[12] The allocation issue is discussed at length, *infra*. The Commission, as we will explain there, has declined to allocate costs for using the billing process between the company and its ratepayers. Assuming *arguendo* that some allocation were realistic, it would be reasonable ratemaking and within the Commission's statutory powers to allocate a considerable portion of postage and other mailing expenses to the company if it uses the billing process for political purposes. If an allocation of other expenses is made, the cost of using the billing process will be much higher than using alternative means of communication such as newspapers. For example, based upon Consolidated Edison's cost estimate (App. 15-18) if one-half the postage costs of a monthly billing were allocated to the company, the cost would be $105,000 compared to $30,300 to run a full page ad in the New York Times, The Daily News and the Westchester Rockland Newspaper Group, newspapers that cover Consolidated Edison's service territory. Apparently, Mobil Corporation an *amicus* herein believes that newspaper advertising is effective since it effectively runs advertisements on controversial issues in the New York Times (Mobil Corporation, Br. pp. 4-5).

velopes, assembling the computerized mailing lists and all other expenses associated with the billing process so that its management may use this ratepayer-financed facility to provide a free ride for the dissemination of its management's views. The "bottom line" of Consolidated Edison's argument is not that it cannot communicate by all other means including separate direct mailings, but rather that it wants free use of the ratepayer-financed billing mechanism to defray the cost of disseminating its views. Any economies that Consolidated Edison assumes it will achieve by using the billing process would thus be the result of foisting the costs of the mailing onto its ratepayers.

C. The Commission's Order Fulfills Important State Interests.

In addition to finding that the Commission's bill insert ban was an evenhanded restriction which foreclosed only one channel of communication, the New York Court of Appeals also found (J.S. App. 10a) that order fulfilled important state interests, thus meeting the third criteria for a "time, place and manner" restriction. The State interests sought to be achieved by the ban involve both practical problems encountered in other contexts by this Court and other issues of a more technical regulatory nature having particular significance because of the status of Consolidated Edison as a regulated monopoly.

Consolidated Edison (Br. pp. 17-21) when discussing governmental interests underlying the Commission's bill insert regulation either ignores or misconstrues the bulk of the Commission's findings. The order relates to materials sent with utility bills. Consolidated Edison, of course, has the ability to bill most of the residents in its service area only because it is a franchised monopoly having the right to serve most of New York City and a portion of Westchester County. No other utility may legally offer service in competition with Consolidated Edison. One of the necessary adjuncts of

providing utility service is the billing function which enables the utility to receive payment for service rendered. Since the billing process is a part of providing utility service, Consolidated Edison is legally entitled to receive rates designed to pay for it (New York State Public Service Law, § 66). Therefore, a portion of each ratepayer's utility payment pays for the cost of the billing. Consolidated Edison, however, has used and desires to continue to use the billing process for a non-utility purpose, a mechanism to provide a free ride for inserts concernings its management's views on nuclear power and other controversial issues.

1. Allocation Of Limited Space.

Confronted with this background, the Commission discussed several concerns, which are largely interrelated, that it believed required restricting the billing packet to utility service-related messages. A primary concern (J.S. App. 43a, 65a-66a) was that the billing packet be used most effectively to provide information on utility service of aid to consumers, including energy conservation suggestions, safety tips, complaint procedures and the rights of consumers. As the New York Court of Appeals found (J.S. App. 6a), the Commission has been charged with the duty under the Public Service Law, Section 66(12)(a), to assure that the format and information requirements of bills rendered by New York utilities are rendered in a manner insuring simplicity and clarity. In the discharge of its obligations, the Commission concluded that the utility billing process would best serve the ratepayer if political messages were excluded. The Commission seeks through its restriction to avoid the situations where use of space for political messages would disrupt the utility billing process and deprive utility customers of service-related information by usurping the limited space available (J.S. App. 65a-66a).

This Court has noted several times that allocation of scarce spacial resources is an important governmental interest which may be achieved by regulation of communication. It was one factor listed by Justice Blackmun in *Lehman v. City of Shaker Heights, supra* at 418, when the Court upheld Shaker Heights' ban on political advertisements. The Court has also confronted the limited space problem in the broadcast industry. When upholding the fairness doctrine in *Red Lion Broadcasting Co. v. F.C.C., supra,* the Court noted the need to regulate communication because not everyone can have unlimited access to radio and television frequencies. The space problem was also a factor discussed in *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94 (1973), where this Court refused to require that radio and television stations sell time to responsible entities to present their views on public issues.

As we discuss in connection with the cost allocation problem, *infra,* the Commission would have no way of assuring that messages directly relating to utility service have not been omitted or abridged in order to accommodate political pamphleteering by a utility. The Commission would thus provide no assurance to the ratepayers that the billing process which they underwrite is being used to serve their interest. The problem of space allocation would be even more acute if the billing packet were opened up to opposing points of view as might well be necessary if Consolidated Edison could use its billing process to further its side of a political debate. The Commission would then be inundated with requests to accommodate opposing messages covering varying points of view. Judge Pratt was clearly correct when he concluded (Commission App. 40) that, by restricting the use of bill inserts, the Commission could ". . . avoid being enmeshed in a wide variety of issues and considerations that are not directly related either to the regulatory responsibilities of PSC or to the business of the utilities it regulates."

2. Avoidance Of A Captive Audience.

In conjunction with problems presented by the limited bill insert space, the Commission determined, as another ground for its bill insert prohibition, that using the billing mechanism to disseminate management's views ". . . is tantamount to taking advantage of a captive audience, since the consumers cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism. . . ." (J.S. App. 43a).

The New York Court of Appeals agreed with the conclusion.

> . . .Consumers of utility services, like many others in captive situations, have no choice concerning receipt of a periodic statement from the power company . . . when the insert espouses the utility's viewpoint on a controversial question, it is as likely to offend the sensibilities of the recipient as it is to elicit agreement. Government need not stand idly by and deny assistance to those who are inflamed by having a particular opinion foisted upon them. . . . (J.S. App. 10a).

Consolidated Edison (Br. pp. 17-20) argues that the captive audience argument does not support a restriction on its freedom of speech. In so doing, the company attempts to isolate the captive audience argument from the other grounds discussed by the Commission and fails to deal seriously with the captive audience concept in the context of the bill insert issue.

The company is obviously right when it argues that none of its ratepayers are forced to read the bill inserts they receive and it is doubtless true that many customers merely take bill

inserts and dispose of them promptly in their trash can. These customers, of course, cannot be offended by anything that appears in a bill insert since they are unaware of its content. Surely, however, the company cannot be arguing that all of its customers follow this course of action. If this were the case, the use of bill inserts would merely be an exercise in frustration since there would be no readers for the material.

For those customers who act otherwise and, upon opening their monthly bill from Consolidated Edison, also glance at or read the contents of the accompanying bill insert, the situation is much different. Those customers have the opportunity to learn about complaint procedures, be notified of rate increase proposals, safety tips and ideas about energy conservation which may enable them to save money and be provided better utility service. The Commission's order is designed to assure that the bill insert is used, in fact, for those purposes. Thus, it is important that the recipient is not deterred from reading the insert because of the presence of extraneous material.

The ratepayer who pays the costs of the mailing process is rightly entitled to information relating to the local utility. If the utility is also allowed to place in its bill insert political messages espousing the viewpoints of its management, the ratepayer who reads the bill insert will, in order to receive information relating to utility service, also be exposed to the utility's political messages. The Court of Appeals found that ratepayers may well find the utility's position to be offensive. The resulting reaction of the utility subscriber may be outrage so that the customer immediately discards the insert and thereby loses out on information of direct use to him as a utility consumer. This result will be achieved despite the fact that the very consumers who may be outraged are forced through their utility bills to pay the cost of the mailing.

As we discuss in connection with the subsidy issue, *infra*, there is no case in which this Court has required that a citizen finance the dissemination of materials with which he does not agree. In the bill insert situation, not only would there be compelled subsidization for management's views if appellant's approach were adopted, but the billing process would also be designed to foist the company's views upon the ratepayer since bill inserts are intended to be read for the important consumer information included.

The Commission's determination that ratepayers are a captive audience for bill inserts is plainly correct. The present case is more of a captive audience situation than that in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), where the Court upheld the decision of Shaker Heights to refuse political advertising in its mass transit system. There, the relief sought was to compel the city to accept paid political advertising that would be placed in city-operated buses. Justice Blackmun noted that the city's refusal to accept political advertising, although it accepted other types of advertising, was permissible because ". . .[t]he city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favortism, and the risk of imposing upon a captive audience." (418 U.S. at 304).

In the *Lehman* situation, while riders on the transit system would not have been forced to read political advertising even if the city had accepted it, they would have been exposed to the advertising when they stepped on the bus. In the present case, utility subscribers will merely have to open their utility bills (which they must do in order to continue receiving utility service) in order to be exposed to the bill insert. If the utility subscriber chooses to read the bill insert at all in order to

receive information about utility service, he or she will also be exposed to political arguments of the utility. The Commission's legitimate desire to enhance the prospect that bill inserts be used by consumers to obtain information with respect to problems relating to utility service is an important state interest which supports restricting the usage of bill inserts to utility service messages.

Moreover, the ratepayers here will be exposed to material in their homes if utilities are permitted to use bill inserts to convey controversial messages. This Court has frequently noted that privacy in the home is entitled to protection even as opposed to the First Amendment right of others to communicate. *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970); *Cohen v. California*, 403 U.S. 15 (1973); and *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978).

Apparently, Consolidated Edison is of the opinion (Br. p. 18) that the content of its bill insert could not be offensive to any of its ratepayers. Offensiveness is, however, clearly something to be judged by the recipient of the material and not by the sender. In *Rowan*, this Court noted that the recipient of a dry goods catalog could find the material offensive. Certainly, recipients of pronuclear power advertising could also find the material offensive in light of today's wide ranging controversy over the safety and reliability of this form of energy.

In the instant case, where the ratepayer may not only find the material offensive, but also be compelled to support its dissemination into his or her home, the rights of the ratepayer should certainly be weighed heavily against the right of the utility to use one specific means of communication. The ratepayer who has no alternative but to receive bills from a state-created monopoly is in a more captive situation deserv-

ing of constitutional protection than is the bus rider in *Lehman*, the radio listener in *Pacifica*, or the advertising mail recipient in *Rowan*.

LILCO also discusses (Br. pp. 9-20) a number of aspects of the captive audience and privacy issues. Its wide-ranging discussion wholly fails to address the specific issue before this Court—the case where a recipient of literature is required to pay for its distribution to his or her home in order to continue to receive vital services from a state-created monopoly. We agree with many of LILCO's generalizations, but believe that they are inapposite to this case. There has simply been no attempt to shield persons from offensive ideas; rather, the Commission's order seeks to assure that ratepayers are not compelled to finance dissemination of controversial material and that they receive needed information from the utility, not limited by the utility's desire to use the limited space to express management's political views.

LILCO's suggestion (Br. p. 18) that a regulatory agency may not bar material from the home even if an individual could do so under *Rowan v. United States Post Office Department*, 397 U.S. 728 (1970), ignores the nature and purpose of bill inserts. The bill insert is part and parcel of the billing process and contains material required by regulation to be supplied to customers. There is thus no option to refuse to receive the bill insert. LILCO's suggestion that controversial material *only* could be removed from bill inserts for some customers at their request thus would require duplicate printing, a procedure that seems totally unrealistic and not one urged by any utility. In its suit, LILCO has suggested selective removal of the entire bill insert at a customer's request, but that suggestion would obviously deprive customers of necessary information and be inconsistent with the obligation imposed on the utility to supply certain information to its customers.

3. Elimination Of Free Ride And Forced Subsidy.

The Commission also determined (J.S. App. 67a) that barring the billing process to political messages would prevent the ratepayers from providing a free ride to utility management by subsidizing the dissemination of management's views (with which they may not agree) with utility payments that support the cost of the billing process. Consolidated Edison has agreed to pay incremental costs of producing the billing pamphlet itself but has not agreed that any other allocation of costs to utility management would be appropriate.[13] In this circumstance, the result would be that the ratepayers would pay for the cost of postage, envelopes, assembling the computerized billing list and all other expenses related to a monthly or bi-monthly mailing. Management and the utility's shareholders, without any cost to them, would receive the benefit of the billing mechanism which would provide the means to disseminate their views on controversial issues of public policy.

There is no authority for the proposition that one party is entitled to a free ride for its propaganda at the expense of another party who is compelled to pay the expense. A subsidy would be inconsistent with the Commission's Uniform System of Accounts allocating political expenses to the utility's shareholders[14] and decisions

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[13] Consolidated Edison has previously argued (Ct. of Appeals Br. pp. 22-24) that any allocation of mailing costs to shareholders would be an unconstitutional penalty as a tax on its freedom of speech. LILCO also seems to challenge (Br. p. 24) any allocation of the billing mechanism costs.

[14] Account 426.4, Expenditures for Certain Civic, Political and Related Activities provides:

> This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation or ordinances (either with respect to the

(Footnote continued on following page)

of this Court which have determined that one cannot be compelled to contribute to the cost of publicizing another's views. For example, the Court has held that union members may constitutionally prevent the union's spending a part of their required service fees to contribute to political candidates and express political views unrelated to its duties as an exclusive bargaining representative. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). As with the union members in *Abood*, Consolidated Edison's ratepayers would be compelled to subsidize the dissemination of political views unless the billing process is closed for those purposes. While the ratepayer's bill will not be higher if management includes a political bill insert, management would still receive the benefit of the subsidized free ride, a forced subsidy found impermissible in *Abood*. *See also, Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956); *Elrod v. Burns*, 427 U.S. 347 (1976). Similarly, this Court upheld the check-off system for taxpayer contributions to presidential elections only after noting that: "[t]he scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree. . . ." *Buckley v. Valeo*, 424 U.S. 1, 91 n 124 (1976).

It has been argued at various times below that the subsidy problem can be avoided if the Commission would only make an allocation of costs between the company's shareholders

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(Footnote continued from preceding page)

possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification or revocation of franchises; or for the purpose of influencing the decisions of public officials or advancing the political objective of the utility, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.

and the ratepayers. While the Commission specifically declined to make such a cost allocation (J.S. App. 67a), the relevant costs to be allocated would, we believe, include the costs of the billing mechanism that the New York utilities claim they can utilize without cost to them. *See*, n 13, *supra*.

The reasons for the Commission's refusal to allocate costs are several. Most important is the space allocation problem discussed *supra*. Because space for bill inserts is limited and because management has the ability to pick and choose the bill inserts to include and their scope, there simply can be no assurance that consumer information relating to utility rates and service has not been omitted or truncated in order to accommodate political messages on behalf of utility management. Service-related messages may simply be foregone in order to accommodate the desire of management to advance its position on controversial issues. In those circumstances, a cost allocation would be of little meaning since the consumers would be deprived of information they otherwise would have received.

A second problem with making a meaningful cost allocation here that would negate a perception that management was obtaining a free ride is the nature of the ratemaking process itself. In evaluating expenses to be paid by the ratepayers of regulated utilities, the Commission attempts to ascertain whether the expenses are reasonable and whether expenses are related to public service functions and therefore attributable to the ratepayers. If the expenses are not related to utility service, they may not, in accordance with the Commission's Uniform System of Accounts, be charged to the utility's ratepayers. Non-utility expenses are not taken into account for ratemaking purposes when the Commission determines the revenue requirement of a utility and the company's

shareholders would be required to pay for those expenses out of its retained earnings. The distinction between shareholder-related expenses and expenses to be borne by the ratepayers is commonly termed a "below-the-line expense" (those attributed to shareholders) and an "above-the-line expense" (those attributed to the ratepayers).

While the "above-the-line", "below-the-line" categorization provides a theoretical basis for ratemaking,[15] its application here will not provide a realistic solution to the subsidy problem.[16] The Commission sets rates for the future based upon past expenses and reasonably anticipated changes. Thus, Consolidated Edison can, if it chooses, avoid any loss of earnings caused by a Commission allocation of expenses to management by reducing other expenses, including those directly relating to the rendition of utility service. In other words, an assessment of expenses directly to management may be a meaningless exercise, particularly when expenses are only a miniscule portion of the company's overall operating costs.

[15] But see a discussion of the above-the-line, below-the-line problem by then Chairman Kahn (J.S. App. 48a). Chairman Kahn, while concurring in the bill insert limitation, would have allowed pronuclear advertisement by other means to be accounted for above-the-line, noting that unless disallowed (which he did not favor) the costs would realistically be borne by ratepayers in any event (J.S. App. 54a-56a).

[16] LILCO's argument (Br. pp. 23-24, footnote) attacking the allocation problem notes that ". . . the relatively small sums involved in this case cannot possibly affect future ratemaking computations. . . ." LILCO thus agrees that allocations would be meaningless, precisely the point we have been urging below. Nor, as LILCO contends, does the argument prove too much. In the case of other political expenses (*e.g.*, lobbying), there is neither a specific, additional subsidy from the ratepayers as in the case of bill inserts where all of the embedded costs of a mailing are included in utility rates, nor a restricted space problem. It is the combination of the circumstances here that would render any attempt at allocation essentially meaningless.

If it were possible, however, to make a meaningful allocation, it would, contrary to the claims of the utilities, be reasonable to include as part of the allocation more than merely the out-of-pocket expenses attributable to printing and other related activities required to produce and mail a bill insert discussing management's views on controversial matters. Aside from other considerations discussed above, there would clearly be an economic benefit to management if it could enclose bill inserts solely on an incremental cost basis, riding freely on the ratepayer-financed billing mechanism so that management could avoid postage, envelopes, and other costs attributable to a mailing. Cost allocations necessitated by the sharing of a common facility for multiple parties or purposes normally reflect more than the incremental cost to a joint user in the utility industry. For example, when electric utilities sell surplus energy to other utilities, the utilities charge more than just the cost of producing energy but also add an additional charge to reflect the value of service received by the purchasing utilities. Here, an allocation of embedded expenses reflecting the benefit to utility management of using the billing process would, similarly, be in order.

The company's contention (Br. p. 21) that the ratepayers will pay no more if political bill inserts are enclosed is, (as we have discussed, *supra*), no answer to the subsidy problem.[17]

[17] LILCO also argues (Br. pp. 25-26) that this case does not present a subsidy issue. This view is to be contrasted with its further argument (Br. p. 34) that if it is compelled to open the billing process to others it ". . . would in effect, be required to subsidize its opponents' messages by including them in its billing process. . . ." Of course, in each case the parties paying for the mailing process are LILCO's ratepayers. LILCO's citation of *Walz v. Tax Commission*, 397 U.S. 664 (1970), where the Court determined that tax exemptions to religious institutions are not subsidies in violation of the Establishment Clause is not in point. This Court was plainly concerned with arguments unique to religious institutions and the particular Constitutional history involved.

There does not have to be an out-of-pocket payment in order for there to be a subsidy. For example, Congress has acted to control the use of the franking privilege (39 U.S.C. § 3210 (a)(5)(C)(D)) and fourth class postal rates (39 U.S.C. § 4554(a)(1) and § 4555(a)) to assure that no subsidy is provided to the sender for improper purposes even though it would cost no more for the postal service to handle prohibited materials enclosed in the franked or discount envelopes. And, as noted above, utility rate practices belie the suggestion that the beneficiary of an available benefit should only pay for incremental costs. While the billing mechanism is, in the Commission's view, not the proper forum in which utility opinions on political or controversial matters should be disseminated, the ratepayers should at least get full value for the mechanism they would be providing. In that case, however, the monetary advantage of using bill inserts would, at best, be insignificant. *See supra,* p. 16 n 12.

Consolidated Edison also contends (Br. p. 21) that the matter of cost allocation is irrelevant because the Commission's ban on bill inserts would apply even if the shareholders pay for it in full. The contention is misleading because the Commission has not banned the company from making separate mailings to its ratepayers provided that the shareholders pay the costs. The Commission's language referred to by Consolidated Edison (J.S. App. 43a) was obviously concerned with payment in full for the bill insert only. Since none of the utilities ever suggested they would pay for the entire bill insert, including its mailing, the Commission never dealt with the postulated situation. Indeed, the situation is academic inasmuch as the utilities have made it clear that the use of the billing mechanism is desired principally because it is inexpensive.

The Commission also faced a related problem when it considered the free ride—subsidy issue. The New York State Public Service Law (Section 65(3)) prevents discrimination in the use of the billing process by management:

> No gas corporation, electric corporation or municipality shall make or grant any undue or unreasonable preference or advantage to any person, corporation or locality, or to any particular description of service in any respect whatsoever, or subject any particular person, corporation or locality or any particular description of service to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

There is no exemption under the antidiscrimination section of the law for utility management. The use of the billing process for political purposes would obviously give management a benefit unavailable to others, as long as the use of bill inserts is not available to anyone else. Consolidated Edison strongly opposed (R. 251-254) letting other parties enclose messages. The Commission found that (J.S. App. 64a-65a) use of bill inserts by management confers an "undue advantage" and that the practice should be eliminated.[18]

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[18] LILCO (Br. pp. 20-23) sets forth a picture of the Commission as the purported equalizer of speech resources. This argument misses the point. The Commission is not concerned about LILCO's relative ability to tout its position on controversial matters. Rather, the Commission is concerned that ratepayers are not compelled to pay for this process as part of their required service rates. LILCO's purported willingness to bear all the costs associated with political bill inserts (Br. p. 24) still does not solve the spacial allocation and rate allocation problem discussed herein. LILCO has never suggested that it would be willing to bear any substantial costs of the mailing itself, such as half the costs of a mailing that might be reasonable on a sharing of the benefits basis if it were to use a bill insert for political purposes.

4. Avoidance Of A Public Forum.

Finally, the Commission was also confronted with a request by the Natural Resources Defense Council and others to open up the billing envelope to opposing points of view if utilities were permitted to use bill inserts for political purposes (App. 32-33). The proponents of open access prepared a response to a Consolidated Edison January 1976 bill insert on nuclear power (App. 38-43). They requested that it be included in a subsequent bill insert. The Commission rejected the open access approach stating (J.S. App. 66a-67a):

> . . .[W]e were all convinced ultimately that it would be difficult to administer fairly,[1] and would tend to lessen undesirably the number of bill inserts dealing directly with such useful and uncontroversial information as consumer conservation measures.

[1] We note that no utility company has submitted to us a proposal for handling controversial issues in bill inserts in this manner.

The Commission thus chose to restrict the billing process to utility service related matters rather than create a public forum to carry on political dialogues. Judge Pratt agreed that this was an important state interest supporting the Commission's ban (Commission App. 39-40). There is a clear likelihood both under New York law and federal decisions that if the Commissision allows use of the billing process for political discussions other points of view must be allowed on an equal footing. For example, the New York Court of Appeals has held that state sanctioned use of a facility for the use of one party converts the facility to a public forum which may

be used by all. *East Meadow Community Concerts Association v. Board of Education,* 18 N.Y.2d 129 (1966).[19]

A situation similar to the bill insert problem is found in *Bonner-Lyons v. School Committee of City of Boston,* 480 F.2d 442 (1st Cir. 1973). In that case, the school committee had used the internal distribution system of the city schools to disseminate notices opposing the use of busing to achieve racial integration. On the other hand, the plaintiffs who wanted to organize a pro-busing rally were denied the use of the distribution system. The court stated (480 F.2d at 444):

> . . .[I]t is well settled that once a forum is opened for the expression of views, regardless of how unusual the forum, under the dual mandate of the first amendment and equal protection clause neither the government nor any private censor may pick and choose between those views which may or may not be expressed. [Citations omitted.]

Even though utility facilities are not public facilities, sanctioning by the Commission of political discussions, particularly if the bulk of the cost of disseminating those discussions is (as the utilities claim it should be) provided by the ratepayers, will create a situation no different in result than that in cases where public forums have been established in publically owned facilities. In addition, the anti-

[19] Despite LILCO's arguments to the contrary (Br. p. 31), Commission approval of the use of political bill inserts would probably provide the necessary state action to create a public forum. *See, Jackson v. Metropolitan Edison Co.,* 419 U.S. 345 (1974). State action might exist under the New York State Constitution if the Commission sanctions the use of political bill inserts even if it did not exist under the United States Constitution. *Sharrock v. Dell Buick,* 45 N.Y.2d 152 (1978).

discrimination provision of the Public Service Law discussed *supra,* shows a strong state interest in equal treatment in the use of utility facilities.

II. The Commission's Standard For Restricting Bill Inserts That Involve "Controversial Matters Of Public Policy" Is Sufficiently Specific.

Consolidated Edison also argues (Br. pp. 26-27) that the Commission's ban is void for vagueness. However, it suffers from none of the vices alleged. It will not trap the innocent by failure to provide full warning. Consolidated Edison and all other utilities are aware of what is prohibited by the ban. The Commission has determined (J.S. App. 68a) that two areas, the controversy over nuclear power development and the controversy over public ownership of utility facilities, fall within its ban. Further guidance is provided by the Commission's long-standing Uniform System of Accounts, Account 426.4 set forth *supra,* p. 25 n 14. Judge Pratt found that (Commission's App. 29):

> . . .[I]n context the phrase is a synonym for the "political advertising" for which expenditures are recorded in Account 426.4. Interpretation of what is "controversial" or "non-controversial" may be governed by those considerations which determine expenditures recorded in that account. PSC has already had some expertise, and the public utilities some guidance, on what matters are considered "political" and thus subject to recording in Account 426.4; these interpretations may similarly be used as guidelines in determining what is or is not "controversial".

The standard is also not subject to arbitrary and discriminatory enforcement. Any Commission determination is subject to expeditious judicial review pursuant to Article 78

of the New York State Civil Practice Law and Rules. In addition, the standard does not inhibit exercise of First Amendment freedom because it provides adequate guidance as to what is prohibited.

On rehearing, the Commission offered (J.S. App. 68a) to provide prompt advisory rulings on whether a subject fell within its ban. Consolidated Edison (Br. p. 27) criticizes the offer as censorship. The utility need not seek advance guidance if it does not desire it. The Commission was merely trying to be helpful recognizing that it is dealing with supposedly responsible entities in the context of a regulatory environment. Moreover, New York's utilities are not like demonstrators or others whose spontaneous activities may be inhibited if they wait for official sanction before engaging in political activities.[20]

The Commission's standard is virtually identical with that upheld by the Supreme Court in *Red Lion Broadcasting v. F.C.C.,* 395 U.S. 367, 395-396 (1969)[21] In that case, the Court rejected a challenge to the Federal Communications Commission's fairness doctrine, finding that the standard used by

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[20] LILCO (Br. pp. 43-44) criticizes the Commission's offer as vesting arbitrary powers in its staff. No where in the record is there any indication that the advisory opinions will be provided by staff. They will be provided, as promised, by the Commission.

[21] LILCO's attempt to distinguish *Red Lion* (Br. p. 44, n 23) deals only with the consequences of falling within the standard adopted. It cannot deny that the provision is virtually identical with that in the present case. LILCO also refers to *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978). As Judge Pratt found (Commission App. p. 30) that the case was "readily distinguishable" since the rejected standard there had no prior history of interpretation or guidance.

the FCC, "controversial issues of public importance," was not unconstitutionally vague. Furthermore, in *Abood, supra,* this Court noted (431 U.S. 240, n 41), that the union had adopted, as a corrective measure, an accounting procedure allowing a dissenting employee to protest the expenditure of his agency shop fee for " '. . .activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours, and conditions of employment. . . .' " The Court expressed no concern with the standard adopted by the union.

Conclusion

For the above reasons, the decision of the Court of Appeals of the State of New York should be affimred in all respects.

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